JMB Silverpark Sdn Bhd v Silverpark Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24 NCVC-2148–08 OF 2012
YEOH WEE SIAM J
10 DECEMBER 2012

Civil Procedure — Mode of commencement — Originating summons — Whether correct originating process used — Claim by joint management body for developer to surrender club house being common property — Whether use of originating summons to begin action proper — Whether suit could be determined by construction or interpretation of sale and purchase agreements and relevant statutes — Whether evidence could be adequately adduced through affidavits — Whether originating summons correct mode

Land Law — Common property — Club house — Whether club house in residential apartment was common property — Whether developer should surrender club house to joint management body ('JMB') — Whether JMB estopped from claiming club house as common property due to previous payment of maintenance fees to developer — Strata Titles Act 1985 s 4 — Building and Common Property (Maintenance and Management) Act 2007

In this originating summons ('OS'), the plaintiff applied for, inter alia, the following reliefs: (i) a declaration that the club house described in the statutory sale and purchase agreement ('SPA') between parcel purchasers in the Silverpark Apartments and the defendants was 'common property' as envisaged under the Strata Titles Act 1985 ('the STA') and the Building and Common Property (Maintenance and Management) Act 2007 ('the BCP'); (ii) a declaration that the first defendant wrongfully occupied the club house as a trespasser; and (iii) an order to compel the first defendant to forthwith deliver the club house to the plaintiff who was the joint management body ('the JMB'). The first defendant filed this notice of application under O 18 r 19 or alternatively under O 28 r 8 of the Rules of Court 2012 ('the ROC') for orders that the OS be struck out or alternatively for the OS proceedings be continued as if the matter had been begun by writ. The first defendant raised the following issues to be tried: (i) whether the subject club house was owned by the first defendant; (ii) whether s 2 of the BCP has retrospective effect and was applicable in the facts of this case; (iii) whether the reliefs claimed by the plaintiff violated the rights of the first defendant under art 13(1) of the Federal Constitution; (iv) whether the plaintiff was under a statutory obligation to claim the possession of the club house and in failing to do so would cause any legal action to be initiated against it by the management corporation after the

strata title was been issued; and (v) whether the plaintiff was estopped from claiming that the club house was a common property and claiming the possession of it since the plaintiff had previously invoiced and had been paid maintenance fees by the first defendant.

Held:

(1) The main issue to be decided in this matter was whether the club house was a 'common property' under the statutory SPA, the STA and the BCP ('the three documents'). This could be determined primarily by a construction or interpretation of the three documents. Where evidence was required, such evidence could be adequately adduced through affidavit evidence. As such, the correct mode for commencement of this action was by way of an OS, and not by way of a writ of summons (see para 5).

(2) There was no evidence that such part of the land that formed the club house was comprised in any parcel. The club house was a 'common facility' under the second schedule to the statutory SPA. The second limb to the definition of 'common property' in cl 31(c) of the SPA was wide enough to cover the club house. The club house was also a common property under the BCP (see paras 8–9).

(3) There was no concrete or documentary evidence adduced by the first defendant to prove that the club house was comprised in any parcel, or was any provisional block as shown in the approved strata plan, or was a separate plot owned by the first defendant, to prove that the club house was not a common property. Therefore, going by the definition in s 4 of the STA, the club house was a common property (see para 23).

(4) Pending the establishment of the MC, in the exercise of its statutory functions, the JMB had the responsibility to manage and maintain the club house which was a common facility and common property. Therefore, the plaintiff had the locus standi to take this action against the first defendant for wrongfully occupying the club house (see para 33).

(5) The status of the club house, whether it was common property, was a matter of law, and had to determined by the construction and interpretation of the relevant provisions of the statutory SPA, the BCP and the STA. Since, the club house had been held to be a common property, the plaintiffs arguments of estoppel could not be sustained because there is no estoppel against statute (see paras 35–36); *United Malayan Banking Corporation Sdn Bhd v Syarikat Perumahan Luas Sdn Bhd* [1998] 3 MLJ 352b referred; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49 referred.

[Bahasa Malaysia summary

Di dalam saman pemula ('SP'), plaintif memohon untuk, antara lain, relief-relief berikut: (i) deklarasi bahawa rumah kelab yang digambarkan di dalam perjanjian jual beli ('PJB') statutori di antara pembeli-pembeli petak di dalam Pangsapuri Silverpark dan defendan-defendan adalah 'common property' seperti yang diperuntukkan di bawah Akta Hakmilik Strata 1985 ('AS') dan Akta Bangunan dan Harta Bersama (Penyenggaraan dan Pengurusan) 2007 ('ABHB'); (ii) deklarasi bahawa defendan pertama dengan salah telah menetap di rumah kelab sebagai penceroboh; dan (iii) perintah untuk mengarahkan defendan pertama untuk memberikan rumah kelab kepada plaintif yang mana merupakan badan pengurusan bersama ('BPB'). Defendan pertama memfailkan notis permohonan ini di bawah A 18 k 19 atau secara alternatif di bawah A 28 k 8 Kaedah-Kaedah Mahkamah 2012 ('KM') untuk perintah-perintah supaya SP dibatalkan atau secara alternatif supaya prosiding-prosiding SP untuk diteruskan seperti mana perkara tersebut telah dimulakan oleh writ. Defendan pertama membangkitkan isu-isu berikut untuk perbicaraan: (i) sama ada subjek iaitu rumah kelab adalah milik defendan pertama; (ii) sama ada s 2 ABHB mempunyai kesan retrospektif dan boleh digunapakai dalam fakta kes ini; (iii) sama ada relief-relief yang dituntut oleh plaintif mencabul hak-hak defendan pertama di bawah perkara 13(1) Perlembagaan Persekutuan; (iv) sama ada plaintif di bawah kewajipan statutori untuk menuntut milikan terhadap rumah kelab dan kegagalan untuk melakukan sedemikian akan menyebabkan apa-apa tindakan undang-undang untuk dimulakan terhadapnya oleh perbadanan pengurusan selepas hak milik strata dikeluarkan; dan (v) sama ada plaintif diestop untuk mendakwa bahawa rumah kelab adalah hartanah terbuka dan menuntut milikannya memandangkan plaintif sebelumnya telah diinvois dan telah dibayar fi penyenggaraan oleh defendan pertama.

Diputuskan:

(1) Isu utama untuk penentuan dalam perkara ini adalah sama ada rumah kelab merupakan 'common property' di bawah PJB statutori, AHS dan ABHB ('ketiga-tiga dokumen'). Ini boleh ditentukan terutamanya melalui pembinaan atau pentafsiran ketiga-tiga dokumen. Di mana keterangan diperlukan, keterangan demikian secara memuaskan boleh dikemukakan melalui keterangan afidavit. Oleh demikian, cara yang betul untuk memulakan tindakan ini adalah melalui SP, dan bukan melalui saman writ (lihat perenggan 5).

(2) Tidak terdapat sebarang keterangan bahawa bahagian tanah tersebut yang mana membentuk rumah kelab adalah terangkum di dalam mana-mana petak. Rumah kelab merupakan 'common facility' di bawah jadual kedua kepada PJB statutori. Cabang kedua kepada definisi 'common property' di dalam klausa 31(c) PJB adalah sangat luas untuk

merangkumi rumah kelab. Rumah kelab juga adalah hartanah terbuka di bawah ABHB (lihat perenggan 8–9).

(3) Tiada keterangan kukuh atau dokumentari dikemukakan oleh defendan pertama untuk membuktikan bahawa rumah kelab terangkum di dalam mana-mana petak, atau mana-mana blok sementara seperti yang ditunjukkan di dalam pelan strata yang diluluskan, atau plot berasingan yang dimiliki oleh defendan pertama, untuk membuktikan bahawa rumah kelab bukanlah hartanah terbuka. Justeru, mengikut definisi s 4 AHS, rumah kelab adalah harta milik bersama (lihat perenggan 23).

(4) Dengan tertangguhnya penubuhan PP, dalam melaksanakan fungsi statutorinya, BPB mempunyai kewajipan untuk menguruskan dan mengendali rumah kelab yang mana merupakan kemudahan terbuka dan hartanah terbuka. Walau bagaimanapun, plaintif mempunyai locus standi untuk mengambil tindakan terhadap defendan pertama kerana menghuni rumah kelab dengan salah (lihat perenggan 33).

(5) Status rumah kelab, sama ada ianya merupakan hartanah terbuka, adalah perkara undang-undang, dan hendaklah ditentukan melalui pembinaan dan pentafsiran peruntukan-peruntukan relevan PJB statutori, ABHB dan AHS. Memandangkan, rumah kelab diputuskan sebagai hartanah terbuka, pertikaian plaintif untuk estopel tidak dapat dipertahankan oleh kerana tidak terdapat estopel terhadap statut (lihat perenggan 35–36); *United Malayan Banking Corporation Sdn Bhd v Syarikat Perumahan Luas Sdn Bhd* [1998] 3 MLJ 352b dirujuk; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49 dirujuk.]

Notes

For cases on originating summons, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5709–5721.

Cases referred to

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 MLJ 49, PC (refd)
United Malayan Banking Corporation Sdn Bhd v Syarikat Perumahan Luas Sdn Bhd [1998] 3 MLJ 352b, HC (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 ss 2, 15
Federal Constitution art 13(1)
Rules of Court 2012 O 18 r 19, O 28 r 8
Strata Titles Act 1985 ss 4, 9(1), 21, 21(1)(a), (aa), 34(1)(b)

Saranjit Singh (Nur Faezah with him) (Saranjit Singh) for the plaintiff.
Alan Wong (Zuraifah Abd Rahman with him) (Zain Megat & Murad) for the first defendant.

Maknawiah bte Muslim (Sharif Rizuan & Co) for the second defendant.

Yeoh Wee Siam J:

(In respect of encls 1 and 6)

ENCLOSURE 6

[1] In this notice of application the first defendant is applying under O 18 r 19 or alternatively under O 28 r 8 of the Rules of Court 2012 ('the ROC') and/or the inherent powers of the court for the following orders:

(a) that the proceedings in the originating summons ('the OS') (encl 1) dated 14 August 2012 be struck out;

(b) in the alternative to the above application in (a), an order that the OS proceedings (in encl 1) be continued as if the cause or matter has been begun by writ proceedings;

(c) that all proceedings be stayed until further order be given by this honourable court;

(d) costs for this application to be borne by the plaintiff; and

(e) any other reliefs which this honourable court thinks fit and just.

[2] The grounds for this application, as stated by the first defendant, are as follows:

(a) the plaintiff's action is an afterthought and is estopped to be filed, and as such is scandalous, frivolous and vexatious. The plaintiff has failed to disclose any reasonable cause of action and this action has prejudiced and embarrassed the first defendant and/or is an abuse of the court process; and

(b) alternatively, this is not a fit and proper case to be resolved summarily by affidavit evidence on the following grounds:

(i) the material evidence before this court are, amongst others, inconsistent and conflicting and clearly unable to be elucidated by the parties' affidavit evidence which are equivocal and open to more than one interpretation, in particular the interpretation of the wordings in the subject ie the statutory sale and purchase agreement ('the statutory SPA'); and

(ii) there are disputed material facts which can only be resolved through viva voce evidence by witnesses and after they are subjected to cross-examination.

[3] The first defendant raised the following issues to be tried:

(a) whether the subject club house is owned by the first defendant;

(b) whether s 2 of the Building and Common Property (Maintenance and Management) Act 2007 ('the BCP') has retrospective effect and is applicable in the facts of this case, as claimed by the plaintiff;

(c) whether the reliefs claimed now by the plaintiff violate the rights of the first defendant under art 13(1) of the Federal Constitution;

(d) whether the plaintiff is under a statutory obligation to claim the possession of the club house and in failing to do so would cause any legal action to be initiated against it by the management corporation after the strata title has been issued; and

(e) whether the plaintiff is estopped from claiming that the club house is a common property and claiming the possession of it.

ENCLOSURE 1

[4] In this originating summons, the plaintiff is applying for the following reliefs:

(a) a declaration that the club house, described in the statutory SPA between parcel purchasers and the defendants of the parcels situated in the Silverpark Apartments, is 'common property' as envisaged under the Strata Titles Act 1985 ('the STA') and the BCP;

(b) a declaration that the first defendant wrongfully occupies the club house as a trespasser;

(c) an order to compel or direct the first defendant or its agents, nominees, privies and/or its officers to forthwith deliver the club house to the plaintiff and to vacate and leave the said club house;

(d) a declaration that the first and/or the second defendants are not entitled to enter, use or occupy the club house or any of the common property for purposes of operating and/or managing and/or conducting any private commercial activity without the permission of the joint management body ('the JMB');

(e) an injunction to restrain the first defendant and/or the second defendants or its servants, agents, nominees, privies and/or its officers from trespassing, continuing in occupation of or entry upon the said club house and/or conducting any activity, commercial or otherwise, in the said club house or any other areas in the development that constitutes as 'common property' under the statutory SPA, the STA and the BCP;

(f) an injunction to restrain the first and/or the second defendants or its servants, agents, nominees, privies and/or its officers from taking any steps, preparatory or otherwise and/or making applications to the authorities with a view to obtain a separate strata title to be issued to the club house;

(g) an injunction to restrain the first and/or the second defendants or its servants, agents, nominees, privies and/or its officers from interfering with or preventing the plaintiff or from attempting to interfere, frustrate impede, annoy either directly or indirectly the plaintiff from performing its statutory obligations under the BCP;

(h) general damages to be assessed;

(i) damages for trespass at the rate to be determined from 19 January 1996 until the date that possession of the club house is delivered up;

(j) interest at the rate of 4%pa on the amounts awarded in (h)–(i) above from the date of award till the date of realisation;

(k) costs of this application; and

(l) further and/or other reliefs.

THE COURT'S DECISION GIVEN ON 19 NOVEMBER 2011 REGARDING ENCL 6

(a) Prayer (a)	:	This is withdrawn by the first defendant and accordingly struck out.
(b) Prayers (b)–(c)	:	Dismissed.
(c) Prayer (d)	:	Costs of RM3,000 are to be paid by the defendants jointly to the plaintiff.

THE COURT'S DECISION GIVEN ON 19 NOVEMBER 2011 REGARDING ENCL 1

(a) Prayers (a)–(g)	:	Allowed.
(b) Prayers (h)–(j)	:	The plaintiff is given the liberty to file a notice of application for damages which have to be proved to have been suffered before the court can proceed to assess damages, if any.
(c) Costs of RM5,000 are to be paid by the defendants jointly to the plaintiff.		

GROUNDS FOR THE COURT'S DECISION REGARDING ENCLS 6 AND 1

Correct mode of commencement

[5] The main issue to be decided in this matter is whether the club house is a 'common property' under the statutory SPA, the STA and the BCP ('the three documents'). This can be determined primarily by a construction and/or interpretation of the three documents. Where evidence is required, such evidence can be adequately adduced through affidavit evidence. As such, the correct mode for commencement of this action is by way of an OS, and not by way of a writ of summons. I do not think that for a case of this nature, it requires a full trial with witnesses to be called for cross-examination. I therefore hold that the plaintiff had not erred in commencing this action by an OS and there is no necessity to convert and continue these proceedings as if the cause or matter has been begun by a writ of summons.

Whether the club house is a common property

[6] In the Second Schedule to the statutory SPA, the club house in the development is listed under 'Common Facilities and Services' under para (a) as:

> List and description of common facilities serving the said housing development:-
>
> i) A club house with facilities for the operation of -
>
> - one restaurant
> - one shop
> - one gym/games room
> - one multipurpose room
> - one laundry.

[7] Clause 31(c) of the interpretation section of the statutory SPA provides:

> 'common property' means so much of the land as is not comprised in any parcel (including any accessory parcel), or any provisional block and the fixtures and fittings including lifts, refuse chutes, drains, sewers, pipes, wires, cables and ducts *and all other facilities and installations used or capable of being used or enjoyed in common by all the purchasers.* (Emphasis added.)

[8] In applying the definition of 'common property' in the statutory SPA to the present case, the court finds that there is no evidence that such part of the land that forms the club house is comprised in any parcel. It is not any lot or proposed lot for any purchaser or any other person, including the developer ie the first defendant.

[9] The club house is a 'common facility' under the Second Schedule to the

statutory SPA. The second limb to the definition of 'common property' in cl 31(c) of the same SPA is wide enough to cover the club house ie under the provision, 'and all other facilities and installations used or capable of being used or enjoyed in common by all the purchasers'. There is ample evidence, and this is not denied by the first defendant, that the purchasers of the parcels in the housing development ('the development') were using and enjoying the common facility of the club house.

[10] The definition of 'common property' in s 2 of the BCP is as follows:

> *'common property', in relation to a development area, means so much of the development area as is not comprised in any parcel*, such as the structural elements of the building, stairs, stairways, fire escapes, entrances and exits, corridors, lobbies, fixtures and fittings, lifts, refuse chutes, refuse bins, compounds, drains, water tanks, sewers, pipes, wires, cables and ducts that serve more than one parcel, the exterior of all common parts of the building, playing fields and recreational areas, driveways, car parks and parking areas, open spaces, landscape areas, walls and fences, *and all other facilities and installation and any part of the land used or capable of being used or enjoyed in common by all the occupiers of the building.* (Emphasis added.)

[11] In the text book, *Strata Title in Singapore and Malaysia* (3rd Ed), Lexis Nexis 2009 by Professor Teo Keang Sood, regarding what constitutes 'common property' in a strata development, he stated:

> From the above definition of common property in BMSMA, it is clear that to amount to common property, two requirements must be satisfied: the first is that such part of the land and building concerned must not be comprised in any lot or proposed lot, and second that the part concerned must be used or capable of being used or enjoyed by occupiers of two or more lots or proposed lots. These two requirements are conjunctive, such that satisfying one without the other would not suffice ….

[12] The definition of common property in the BCP is more detailed than the one in the statutory SPA in that it includes more parts of the development as common property but in substance the two definitions are similar in the requirement for the two limbs to be fulfilled, as discussed by Professor Teo Keang Sood in his book). Therefore, it can be safely concluded that the club house is a common property under the BCP.

[13] Under s 4 of the STA:

> 'common property' means so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan;

[14] The first defendant relied on exhs ANS4 and ANS6 (see the first defendant's affidavit in reply 2–3 in encls 9 and 11 respectively). The first defendant averred that exh ANS4 is the official site plan (and location plan) certified by the architect in February 1994 and it shows that there is indeed a separate plot and/or parcel which had been comprised for the club house. The first defendant contended that this separate plot or parcel for the club house had never been sold and it is shown in the strata plan as a parcel, and therefore the club house is considered a proprietary club owned by the developer ie the first defendant, and a strata title has to be issued for the club house.

[15] There is no averment by the first defendant that exh ANS4 is the approved plan. The recitals of the statutory SPA only refer to the building plans. The first defendant did not disclose the building plans or the provisional block plans.

[16] The site plan and location plan in exh ANS4 has a notation at the far right of the plan which states:

> CADANGAN SEBUAH REKREASI (club house) 3 - TINGKAT UNTUK PANGSAPURI PERANGINAN Dl ATAS LOT 2493 2494, PT. 1495, PT. 1496, PT. 1497 DAN PT. 1498, BUKIT FRASER, PAHANG DARUL MAKMUR UNTUK SILVERPARK SDN BHD

[17] From the above notation, it appears to me that the first defendant had put up the plan to build the club house for the resort condominiums in the development, which means it was designated to be a separate plot of parcel, not to be sold, but to be used as a common facility of the purchasers of the development, and intended to be a common property.

[18] The first defendant averred that it did not disclose the approved plan because the strata plot plan is unavailable and undergoing its finalisation stage. To date, the first defendant only has the draft strata plot plan which is pending verification by the surveyor and to be submitted to the Pejabat Tanah dan Galian Negeri Pahang. The first defendant has made full payment of the survey fees to Lembaga Jurukur which is before issuance of the master title. The receipt and a copy of the draft strata plot plan dated 1 October 2012 are collectively marked as exh ANS6. The first defendant contended that in the draft strata plot plan, there is a distinct and separate strata plot for the club house which is labeled as 'M22'.

[19] In the 'Pelan Lokasi' in exh ANS6 there is a certification by the surveyor, Mohd Hanifa K Abd Hamid, that the building M22 and provisional block are within the boundaries of Lot 4559, and another certification by the same surveyor that he has compared the 'pelan lokasi' with the original building plan

which was prepared by the architect or professional engineer responsible for the construction and found that the plan is in accordance with the said plan.

[20] There is no evidence that the alleged draft strata plot plan in exh ANS6, which is only a location plan and floor plan of a building referred to as M22, has been certified by the land surveyor pursuant to s 9(1) of the STA. In fact, the first defendant admitted in encl 11 that the draft strata plot plan is pending verification by the surveyor, Sr Hj Mohd Hanifa K Abd Hamid, before submission to the land office in Pahang. Exhibit ANS6 cannot be accepted as evidence that the building, M22, is situated on a separate strata plot which is distinct from that on which the development is situated.

[21] Counsel for the first defendant submitted that the Director of Lands and Mines will only approve the application for the issuance of the strata titles if the said draft strata plot plan is made in accordance with the approved building plan and the director of lands and mines is satisfied that there is no change in the number of parcels in the development. This is set out clearly in s 21(1)(a) and (aa) of the STA. The first defendant contended that from prayers 5–6 of encl 1, the plaintiff is abusing these proceedings to undermine the functions and powers of the director of the lands and mines under the STA to decide on the issuance of strata titles for this development.

[22] Since the location plan and floor plan have yet to be certified by the land surveyor in accordance with s 9(1) of the STA, the question of the director of lands and mines exercising his functions under s 21 of the STA does not arise at this stage.

[23] There is no concrete or documentary evidence adduced by the first defendant to prove that the club house is comprised in any parcel, or is any provisional block as shown in the approved strata plan, or is a separate plot owned by the first defendant, to prove that the club house is not a common property. Therefore, going by the above definition in s 4 of the STA, the court holds that the club house is a common property.

[24] The first defendant is a mere developer and has no proprietary rights or interest ('interest') in the development or the club house. The first defendant is acting on a power of attorney given by the second defendant, the original owner of the land, to be used for the development. The question of depriving the first defendant from his property in the club house in contravention of art 13(1) of the Federal Constitution does not arise at all since the first defendant does not own the land or the club house.

[25] All the time during the period for filing of affidavits and written submissions as ordered by the court, the second defendant had been silent and did not file any affidavit or written submissions. On the day of hearing, counsel for the second defendant showed the court an affidavit in reply of the second defendant which she had couriered to the court a few days before the hearing. The court did not accept that affidavit because there is no court record of proof of filing or payment of praecipe for the document. Therefore, on record there is no evidence adduced by the second defendant.

[26] The first defendant exhibited the power of attorney ('the PA') dated 13 December 1991 from the second defendant who is the proprietor or owner of the land upon which the development is situated. Under the PA, the first defendant as the second defendant's attorney is to 'carry out and complete all and every stage of the development of the housing project ('the project') on the said land upon the terms and conditions contained in the privatisation agreement' (dated 22 November 1991). However, the privatisation agreement was not exhibited.

[27] The PA itself does not state that the first defendant has a proprietary interest to the land, or the club house, for the development. Clause 1 of the PA clearly states that the PA was given for the purpose of developing the project on the said land.

[28] If at all anyone has the right to assert a proprietary claim to the club house, it should be the second defendant, and not the first defendant. Here, the second defendant is remains silent. The first defendant's lack of proprietary interest over the club house is evidenced by the fact that the first defendant is now seeking to apply for a separate title for itself for the club house in the development.

[29] The certificate of fitness dated 18 January 1996 shows that the club house is a separate unit from the other 348 apartments in the development. It also confirms that the construction of the units and the club house were in accordance with the building plans approved by the appropriate authorities on 28 January 1991.

[30] It is clear that the club house was never intended to be separate from the development. It is an integral part of the development and is a common property under the statutory SPA and the two statutes ie the STA and the BCB. Under s 34(1)(b) of the STA, a proprietor shall have, in relation to common property, the right of user of which he would have if he and other proprietors were co-proprietors thereof.

[31] There is no provision in the statutory SPA for the first defendant, as developer, to contract out of the provisions of the SPA. There is no provision in the same SPA for the first defendant to amend the building plan or provisional plans existing at the time of the execution of the statutory SPA to allow the first defendant, as a developer, to apply for a separate title to the club house for itself on the basis that it is a separate plot.

The plaintiff, being the joint management body, has the right to manage and maintain the club house

[32] The first defendant contended that the plaintiff is merely a joint management body ('JMB') under the BCP and it does not have any proprietary interest to claim the club house. Ultimately, once the strata titles are issued, the JMB has to hand over the development to the management corporation ('the MC') under the STA.

[33] It is true that the plaintiff or the JMB is appointed under the BCP to manage and maintain the development. However, pending the establishment of the MC (see s 15 of the BCP), in the exercise of its statutory functions, the JMB has the responsibility to manage and maintain the club house which is a common facility and common property. Therefore, if the first defendant is claiming the club house for itself and running a resort business at the club house through its sister company, Teruntum, the plaintiff has the locus standi to take this action against the first defendant, and even Teruntum, which are wrongfully occupying the club house, rent-free.

No estoppel

[34] The first defendant contended that the plaintiff is estopped from filing this action since the plaintiff had previously invoiced and had been paid maintenance fees by the first defendant.

[35] In this case, the status of the club house, whether it is common property, is a matter of law, and has to determined by the construction and interpretation of the relevant provisions of the statutory SPA, the BCP and the STA.

[36] The court has held in the above that the club house is a common property. Therefore, the plaintiff's arguments of estoppel cannot be sustained because there is no estoppel against statute.

[37] In *United Malayan Banking Corporation Sdn Bhd v Syarikat Perumahan Luas Sdn Bhd* [1998] 3 MLJ 352b Edgar Joseph Jr J (as he then was) at p 356 held:

> The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute.

[38] In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49 Viscount Radcliffe, Privy Council, at p 54 stated:

> … a party cannot set up estoppels in the face of a statute ….

Legal opinions of the first defendant's solicitors etc cannot supersede contractual and statutory provisions

[39] The first defendant contended that it had acted on the legal opinions of its solicitors, Messrs Iza, Ng Yeoh & Kit dated 3 December 1996, and Messrs Kassim Tadin Wai & Co dated 13 December 1996 (exh ANS2 of the first defendant's affidavit in reply 1 in encl 5) and applied for a different strata plot for the club house in its application for the strata title of the development. Apart from that, the architect for the development and the consultant for the application of the strata plot have confirmed that a separate strata plot for the club house can be applied for and obtained.

[40] With respect, legal opinions and advice from the architect and consultant are finally subject to the court's interpretation and application of the relevant provisions of the statutory SPA, the BCP and the STA to the present case.

[41] The same applies to the House Rules (exh WWM9 of encl 9) of the forth annual general meeting ('AGM') on 29 October 2011 of the JMB Silverpark Resort. They are subject to the provisions of the statutory SPA, and the BCP and STA, wherever applicable.

[42] Based on the above considerations, I therefore ordered accordingly. **A**

Order accordingly.

Reported by Kanesh Sundrum **B**

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